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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

9  
10 GABRIELLE GANGITANO,  
11 Plaintiff,  
12 v.  
13 CABRILLO COLLEGE, et al.,  
14 Defendants.

Case No. 17-CV-02870-LHK

**ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND**

Re: Dkt. No. 16

16 Plaintiff Gabrielle Gangitano (“Gangitano”) sues Defendants Alex B. Taurke (“Taurke”)  
17 and Cabrillo College (“Cabrillo”) (collectively, “Defendants”), for causes of action arising from  
18 Taurke’s alleged sexual harassment of Gangitano. *See* ECF No. 1 (“Compl.”). Before the Court is  
19 Cabrillo College’s motion to dismiss. ECF No. 16. Having considered the parties’ submissions,  
20 the relevant law, and the record in this case, the Court GRANTS Cabrillo College’s motion to  
21 dismiss with leave to amend.

22 **I. BACKGROUND**

23 **A. Factual Background**

24 Gangitano is an undergraduate student at Cabrillo. Compl. ¶ 15. In Spring of 2016,  
25 Gangitano was enrolled in a course taught by Taurke, and Gangitano also worked as a tutor under  
26 Taurke’s guidance. *Id.* Sometime during the Spring 2016 term, Taurke asked Gangitano to be  
27 Taurke’s “Supplemental Instructor.” *Id.*

1 Gangitano alleges that when she worked as Taurke’s “Supplemental Instructor,” Taurke  
2 “began to make suggestive comments” and eventually engaged in “offensive conduct,” all of  
3 which were “sexual in nature and sometimes [] accompanied by inappropriate physical touching.”  
4 *Id.* ¶ 16. For example, Gangitano alleges that Taurke “forc[ed] [Gangitano] to feel his scars.” *Id.* ¶  
5 17. Gangitano alleges that this behavior came to a peak in May 2016. First, on May 7, 2016,  
6 Taurke emailed Gangitano and remarked that “you continue to amaze me how mature you are. I  
7 don’t think I’ve ever know [sic] an 18-year-old who’s as put together as you. I was pretty lost  
8 when I was 18. Are you sure you’re not fooling me? Are you actually 30? (I mean you look the  
9 role of a beautiful, young woman, but you sure don’t act it!).” *Id.* ¶ 18.

10 Then, on May 17, 2016, Taurke emailed Gangitano and stated that “I know we don’t have  
11 calculus anymore, sniff, sniff, but if you want to discuss/ Physics, /SI leadership, /your future  
12 theater career,/ or your special extra credit project ;-) / Whatever. I’ll be around. I always enjoy  
13 seeing you!” *Id.* ¶ 19. The following day, Taurke met Gangitano in person and told Gangitano  
14 “you have that superpower where you are enchantingly beautiful and incredibly smart and funny  
15 and beautiful inside and out and you have a superpower of casting a spell on people and you’ve  
16 cast a spell on me.” *Id.* ¶ 20. Taurke also hugged Gangitano and “touch[ed] and strok[ed] her  
17 legs.” *Id.* Then, on May 20, 2016, Gangitano met again with Taurke. *Id.* ¶ 21. During this meeting,  
18 Taurke “closed the blinds to ensure privacy in his office space,” “discretely moved his chair closer  
19 to [Gangitano] so he could put his knees around hers so their knees and thighs would touch,” and  
20 “caressed and stroked the side of [Gangitano’s] face and head.” *Id.*

21 Gangitano alleges that she wanted to file a grievance with Cabrillo and report Taurke’s  
22 conduct, but Gangitano could not figure out the proper procedure. *Id.* ¶ 23. Gangitano states that  
23 Cabrillo’s “Notice of Nondiscrimination” was “not readily accessible to students,” and that it did  
24 not “contain specific information about where to file a complaint, or who to contact.” *Id.* ¶ 24.  
25 Between May 22, 2016, and May 24, 2016, Gangitano attempted to contact Cabrillo’s Title IX  
26 coordinator, but Gangitano was “deferred to many offices, until she was finally directed to a male  
27 athletic coach.” *Id.* ¶ 25. Gangitano “felt uncomfortable talking to [the male athletic coach] about

1 her complaint,” and thus did not file a complaint with Cabrillo at all. *Id.* Instead, on May 25, 2016,  
2 Gangitano filed a complaint with the United States Department of Education Office for Civil  
3 Rights (“OCR”). *Id.* ¶ 26. Gangitano’s complaint with OCR described Taurke’s conduct towards  
4 her, in addition to Cabrillo’s lack of clear procedures for filing grievances about inappropriate  
5 conduct on the part of instructors. *Id.* ¶ 26. In response to that complaint, OCR began investigating  
6 Cabrillo and determined that Cabrillo never actually had a permanent and designated Title IX  
7 coordinator. *Id.* ¶ 27. Further, Gangitano states that on December 21, 2016, Cabrillo “admitted to  
8 inadequacies in its notification, reporting, monitoring, and training requirements and policy  
9 obligations as required under Title IX.” *Id.* ¶ 28. OCR also interviewed Taurke, who “admitted  
10 both to making the statements and realizing that the statements were sexually harassing.” *Id.* ¶ 27.

11       Gangitano quit her job as “Supplemental Instructor” for Taurke before the start of the Fall  
12 2016 academic term “because the potential of seeing or interacting with Professor Taurke made  
13 her feel anxious, nervous, and uneasy based on his prior conduct with her.” *Id.* ¶ 29. Gangitano  
14 alleges that “[w]hile Cabrillo College supposedly initiated a conduct process with Professor  
15 Taurke as a result of the OCR investigative decision, [Gangitano] is informed and believes that  
16 Professor Taurke has been allowed to remain on campus as an employee and no further actions  
17 have been taken by Cabrillo to either address his conduct against her, or to protect others like  
18 herself on the Cabrillo campus from any further actions by Professor Taurke and others.” *Id.* ¶ 32.  
19 Further, Gangitano “believes [Cabrillo] has failed to adequately address and resolve her complaint  
20 as Cabrillo has barely, if at all, implemented any disciplinary actions towards Professor Taurke for  
21 his improper conduct against her.” *Id.* ¶ 33.

22       **B. Procedural History**

23       On May 18, 2017, Gangitano sued Defendants in this Court. *See* ECF No. 1. Gangitano’s  
24 complaint alleged four causes of action: (1) violation of Title IX of the Education Act  
25 Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 (against Cabrillo); (2) violation of 42 U.S.C.  
26 § 1983 (against Cabrillo); (3) sexual assault (against Taurke); and (4) sexual battery (against  
27 Taurke).

1           On July 6, 2017, Taurke answered Gangitano's complaint. ECF No. 17. On June 29, 2017,  
2 Cabrillo filed a motion to dismiss Gangitano's complaint. ECF No. 16. On July 27, 2017,  
3 Gangitano opposed Cabrillo's motion. ECF No. 21. On August 10, 2017, Cabrillo filed a Reply.  
4 ECF No. 25.

5           **II.     LEGAL STANDARD**

6           **A. Motion to Dismiss Under Rule 12(b)(6)**

7           Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a  
8 short and plain statement of the claim showing that the pleader is entitled to relief." A complaint  
9 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure  
10 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead  
11 "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,  
12 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content  
13 that allows the court to draw the reasonable inference that the defendant is liable for the  
14 misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is  
15 not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant  
16 has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule  
17 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s]  
18 the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire &*  
19 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

20           The Court, however, need not accept as true allegations contradicted by judicially  
21 noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look  
22 beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6)  
23 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.  
24 1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in  
25 the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per  
26 curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted  
27 inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183

1 (9th Cir. 2004).

2 **B. Leave to Amend**

3 If the Court determines that a complaint should be dismissed, it must then decide whether  
4 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend  
5 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule  
6 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v.*  
7 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks  
8 omitted). When dismissing a complaint for failure to state a claim, “a district court should grant  
9 leave to amend even if no request to amend the pleading was made, unless it determines that the  
10 pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal  
11 quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing  
12 amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the  
13 moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532  
14 (9th Cir. 2008).

15 **III. DISCUSSION**

16 Cabrillo moves to dismiss the only causes of action asserted against Cabrillo in  
17 Gangitano’s complaint, Counts One and Two. The Court considers each of the Counts below.

18 **A. Count One (Title IX)**

19 Count One of Gangitano’s complaint alleges that Cabrillo violated Title IX. *See Compl.* ¶¶  
20 34–41. Title IX states in relevant part that “[n]o person in the United States shall, on the basis of  
21 sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination  
22 under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §  
23 1681(a). Title IX provides a private right of action to students who are sexually harassed by their  
24 teachers. *See Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (“Unquestionably, Title  
25 IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex,  
26 and when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that  
27 supervisor discriminates on the basis of sex. We believe the same rule should apply when a

1 teacher sexually harasses and abuses a student” (internal quotation marks and citation omitted)).  
2 However, to state a Title IX claim against an educational institution for its faculty member’s  
3 sexual harassment of a student, a plaintiff must allege that (1) “an official [of the institution] who  
4 at a minimum has authority to address the alleged discrimination and to institute corrective  
5 measures on the [institution]’s behalf ha[d] actual knowledge” of the harassment; and (2) the  
6 institution “fail[ed] adequately to respond” to the harassment in a way that “amount[ed] to  
7 deliberate indifference” to the harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274,  
8 290 (1998).

9 Count One of Gangitano’s complaint does not contain adequate factual allegations to state  
10 a claim against Cabrillo under Title IX for teacher-on-student sexual harassment. In Count One,  
11 Gangitano alleges only that Cabrillo (1) “failed to protect [Gangitano] from the unwanted,  
12 inappropriate, injurious and continuing conduct of Professor Taurke . . . by failing to provide  
13 sufficient sexual harassment training . . . , management and supervision of Professor Taurke to  
14 deter and/or prevent[] such unlawful conduct”; and (2) “failed to provide [Gangitano] . . . with  
15 sufficient, easily understandable and accessible information on how to present complaints of such  
16 unlawful conduct, or identification of an appropriate Title IX Coordinator.” Compl. ¶¶ 38–39.  
17 Nowhere in Count One does Gangitano allege facts that plausibly suggest that Cabrillo had “actual  
18 knowledge” of any teacher-on-student sexual harassment committed by Taurke or any other  
19 Cabrillo faculty members. *Gebser*, 524 U.S. at 290. Further, because Count One fails to  
20 sufficiently allege that Cabrillo had knowledge of any teacher-on-student sexual harassment, the  
21 factual allegations in Count One do not plausibly suggest that Cabrillo was deliberately indifferent  
22 to harassment of which Cabrillo had actual knowledge.<sup>1</sup> See *id.* at 290–91.

23 \_\_\_\_\_  
24 <sup>1</sup> In Count One, Gangitano points to a Department of Education regulation requiring schools to  
25 “adopt a public grievance procedure providing for the prompt and equitable resolution of student  
and employee complaints” about sexual harassment. Compl. ¶ 39; see 34 C.F.R. § 106.8(b)  
26 (1997). However, the United States Supreme Court has stated that a defendant institution’s alleged  
failure to comply with § 106.8(b) “does not establish the requisite actual notice and deliberate  
indifference” for a Title IX claim. *Gebser*, 524 U.S. at 292. As a result, Gangitano’s allegation that  
Cabrillo failed to comply with § 106.8(b)’s grievance procedure requirement is not sufficient to  
27 plausibly suggest that Cabrillo was deliberately indifferent to teacher-on-student sexual  
28

In her opposition to Cabrillo’s motion to dismiss, Gangitano raises an entirely new Title IX deliberate indifference theory. Specifically, Gangitano argues in her opposition that (1) Cabrillo had actual knowledge of Taurke’s alleged sexual harassment of Gangitano because Gangitano “[got] the OCR to contact Cabrillo” about the harassment; and (2) “the end result of no complete investigation [of the harassment] conducted [by Cabrillo] after a year, as well as [Cabrillo’s] failure to inform [Gangitano] of any decision or remedial actions specifically about Taurke,” amount to deliberate indifference towards Taurke’s alleged sexual harassment on the part of Cabrillo. ECF No. 21 at 8, 11–12. However, the Court need not address this new theory because Count One of Gangitano’s complaint does not appear to be based on this theory. As explained above, Count One alleges only that Cabrillo (1) failed to sufficiently train and supervise Taurke; and (2) failed to institute an adequate grievance procedure for reporting instances of sexual harassment. *See* Compl. ¶¶ 38–39. Further, Count One asserts that these specific “acts or omissions by Cabrillo” violate Title IX. *Id.* ¶ 40. Count One does not identify any other acts or omissions as violative of Title IX. *Id.* Thus, Count One currently is not premised on Cabrillo’s purported failure to complete an investigation of Taurke and failure to notify Gangitano of any remedial actions against Taurke a year after being contacted by the OCR about Gangitano’s complaint. In other words, Gangitano’s current complaint fails to “provide[] fair notice of the nature of” Gangitano’s new theory of Title IX liability and “the facts which underlie” that theory. *Grid Sys. v. Tex. Instruments, Inc.*, 771 F. Supp. 1033, 1037 (N.D. Cal. 1991). As a result, Gangitano’s current complaint did not adequately plead a Title IX deliberate indifference claim.

21 Accordingly, the Court GRANTS Cabrillo’s motion to dismiss Count One. The Court  
22 affords Gangitano leave to amend because Gangitano may be able to allege sufficient facts to state  
23 a claim under Title IX. *See Lopez*, 203 F.3d at 1127 (holding that “a district court should grant  
24 leave to amend . . . unless it determines that the pleading could not possibly be cured by the  
25 allegation of other facts” (internal quotation marks omitted)).

harassment in violation of Title IX.

1           **B. Count Two (§ 1983)**

2           Cabrillo moves to dismiss Count Two (Gangitano's § 1983 claim) as barred by Eleventh  
3           Amendment sovereign immunity. In her opposition, Gangitano agrees to voluntarily dismiss  
4           Count Two without prejudice. In its Reply, Cabrillo argues that Count Two should be dismissed  
5           with prejudice. However, in light of the numerous exceptions to sovereign immunity established  
6           by California law, *see, e.g.*, Cal. Gov't Code §§ 815, 820, the Court cannot conclude at this stage  
7           that amendment would necessarily be futile. *See Leadsinger*, 512 F.3d at 532. Thus, the Court  
8           GRANTS Cabrillo's motion to dismiss Count Two with leave to amend. Should Gangitano elect  
9           not to amend Count Two, then Cabrillo may move to dismiss Count Two with prejudice in a  
10           subsequent motion to dismiss.

11           **IV. CONCLUSION**

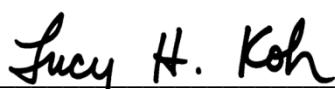
12           For the foregoing reasons, Cabrillo's motion to dismiss is GRANTED. In particular:

- 13           1. The Court GRANTS with leave to amend Cabrillo's motion to dismiss Gangitano's Title  
14           IX claim in Count One.
- 15           2. The Court GRANTS with leave to amend Cabrillo's motion to dismiss Gangitano's §  
16           1983 claim in Count Two.

17           Should Gangitano elect to file an amended complaint curing the deficiencies identified  
18           herein, Gangitano shall do so within thirty (30) days of this order. Failure to meet this thirty-day  
19           deadline to file an amended complaint or failure to cure the deficiencies identified in this order  
20           will result in a dismissal with prejudice. Plaintiff may not add new causes of action or parties  
21           without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure  
22           15.

23           **IT IS SO ORDERED.**

24           Dated: September 20, 2017

25             
26           LUCY H. KOH  
27           United States District Judge